Kyle, Wonda - ESA

From: John Fox [JFox@fenwick.com]

Sent: Friday, May 28, 2004 6:30 PM

To: ofccp-public@dol.gov

Subject: Comments of the Northern California and Silicon Valley ILGS re "Who is an Internet Applicant"

COMMENTS OF THE NORTHERN CALIFORNIA AND SILICON VALLEY ILG CHAPTERS RE THE OFCCP'S MARCH 29, 2004 PROPOSED REGULATION TO AMEND OFCCP'S RECORD KEEPING REQUIREMENT FOR OFCCP MONITORING AND OTHER ENFORCEMENT PURPOSES TO CONFORM TO THE NEW INTERPRETIVE GUIDANCE PROMULGATED BY THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES ("UGESP") AGENCIES

The Industry Liaison Groups (ILGs) are a partnership of Equal Employment Opportunity and Affirmative Action professionals striving to positively change the equal opportunity employment climate. The SVILG operates in Silicon Valley, and the NCILG, operates in San Francisco, the East Bay and northern California. These two ILG Chapters desire to make a difference by providing a forum for members to raise questions, discuss real issues, exchange ideas and solutions, and receive information on trends and legislation pertinent to EEO and Affirmative Action. Our mission is to expand communication and share responsibility between private sector employers and the OFCCP as we work together to further opportunities for women, ethnic minorities and other under-represented groups as defined by law. Collectively, the two ILGs count over 300 of the top companies headquartered in Northern California among their membership.

These two ILGs also believe they may make a special contribution to the discussion of the proposed regulations since northern California first birthed use of electronic resumes and is the world's leader in the development of software systems to analyze and process electronic data, including Internet Applications.

The following attorneys have also lent their time to prepare these comments on behalf of the ILGs: **Fred W. Alvarez**, Chair of the Employment Group at Wilson Sonsini Goodrich & Rosati (headquartered in Palo Alto, California), a former Commissioner of the EEOC and a former Assistant Secretary of Labor at the United States Department of Labor; **John C. Fox**, Chair of the Employment and Labor Group at Fenwick & West LLP (headquartered in Mountain View, California), a former Executive Assistant to the Director, OFCCP; and **Gary R. Siniscalco**, a partner with Orrick, Herrington & Sutcliffe (headquartered in San Francisco, California), formerly Regional Counsel and Senior Trial Attorney for the EEOC in California.

The Industry Liaison Groups appreciate the fact that the federal agencies are preparing to publish written guidance to allow for a "level playing field" among employers subject to Title VII of the 1964 Civil Rights Act ("Title VII"), as amended, and those federal contractors and subcontractors ("contractors") covered by Executive Order 11246, as amended ("E.O. 11246"). The Industry Liaison Groups also appreciate that OFCCP has proposed final regulation and has invited public comment. Our specific comments about what language OFCCP should keep, delete and modify follows.

We make two *alternative* suggestions:

A) Rescind (for the reasons more fully stated below in Section I) the OFCCP's November 13, 2000 regulation imposing, for the first time, the duty on federal contractors to undertake adverse impact analyses; OR

B) If the OFCCP persists in its proposal to cause covered federal contractors and subcontractors ("contractors") to undertake adverse impact analyses, it should go to final with its proposed regulations with the modifications or with the benefit of the comments discussed below in Section II.

SECTION I: RESCIND THE OBLIGATIONS OF CONTRACTORS TO UNDERTAKE ADVERSE IMPACT ANALYSES

1) Nothing in Title VII or the UGESP currently or historically *requires* "employers" to undertake adverse impact analyses. Rather, only OFCCP's sudden regulations rushed through during the end of year holiday season in 2000 so require (uniquely of contractors). [OFCCP's "Burden Statement" suggesting that its proposed regulations impose no additional cost burdens beyond those the public will incur via the proposed Questions and Answers the UGESP agencies published for comment on May 4, 2004 is entirely in error and ignores the fundamental reality that Title VII "employers" have no obligation to undertake adverse impact analyses.]

2) The paperwork burden the OFCCP suggested to OMB in November 2000 to accomplish the newly required adverse impact analyses was entirely specious, understated the true burden by hundreds of thousands of hours per year and bore no resemblance to the true paperwork burden a contractor must undertake to accomplish the called for adverse impact analyses.

3) Even undertaking adverse impact analyses at the low "real world" cost of over $10,000 per (only) 100 employee-facility per year produces highly imperfect adverse impact analyses which are typically both overly-inclusive and underly-inclusive of true "applicants" as the law and OFCCP's proposed regulations define that term. Such frail analyses almost always lead, as a result, to both "false negatives" (leaving contractors with the erroneous sense that there is nothing potentially problematic with its selection system) and "false positives" (leaving contractors erroneously with corporate records polluted with apparent admissions of potentially problematic selection systems and/or with concern that a potentially problematic condition exists).

4) The proposed OFCCP regulations, while having the advantage of more closely stating and adopting Title VII law regarding "who is an applicant", nonetheless suffer from starting from the false premise that contractors are currently able to routinely undertake (or could routinely undertake) adverse impact analyses and could accomplish them with the kind of quality and care the current and proposed regulations envision. Because of the high cost and large paperwork burden, the vast majority of contractors are unable to accomplish the analyses at all, or do so only upon OFCCP Compliance Evaluation, and not routinely and almost always imperfectly.

5) OFCCP's proposed regulations only increase the existing burden to further parse more discreetly who is and who is not an "applicant" from among the many millions of persons interested to seek work from contractors. The high cost of compliance will insure more non-compliance, even among those companies dedicated to non-discrimination ideals.

6) OFCCP should re-think its initial premise that it routinely require contractors to undertake these detailed, highly complex and very expensive adverse impact analyses, usually reserved--by exception--for large scale and enormously expensive high stakes class action litigation driven, indeed, by large private sector plaintiff-side law firms.

7) From a broader perspective, OFCCP should re-think its recent departure from its unique mission as the champion of Affirmative Action to champion of systemic discrimination (already addressed by the EEOC's mission and use of Commissioner Charges and through its Systemic Discrimination Division). Indeed, OFCCP should re-affirm its dedication to affirmative action and emphasize its separate and distinct mission to encourage contractors to undertake Good Faith Efforts to promote the recruitment, selection, training and upward mobility of minorities and women in an effort to make equal opportunity a daily reality in America. Were the OFCCP to focus on what makes it different from the EEOC rather than what makes it like the EEOC, the OFCCP would abandon its redundant and newly stated mission to require and review adverse impact analyses.

SECTION II: ASSUMING OFCCP WERE TO IGNORE THE ABOVE SUGGESTION TO USE THE CURRENT REGULATORY EXERCISE AS AN OPPORTUNITY TO WITHDRAW ITS NOVEMBER 2000 ADVERSE IMPACT REGULATIONS, WE RECOMMEND THE OFCCP PUBLISH ITS PROPOSALS IN FINAL WITH THE FOLLOWING MODIFICATIONS AND WITH THE COMFORT OF THE FOLLOWING SPECIFIC CONFIRMATIONS OF APPROACH

1) The Title Of The Proposed Rulemaking And The Supplementary Information Accompanying The Proposed Rule Are Not Consistent With The Uniform Guidelines Regarding The Requirement To "Maintain" Demographic Data Of Applicants And Hires.

Neither existing OFCCP regulations nor the Uniform Guidelines require a contractor "to solicit race and gender data." Indeed, by misstating the requirements of the Uniform Guidelines, the Proposed Rule attempts to mandate a new, affirmative obligation on federal contractors to "obtain" data on Internet Applicants, instead of the current obligation to retain, maintain, or preserve such information from applications. For example:

- The title of the proposed notice of rulemaking is "Obligation to Solicit Race and Gender Data," despite the fact that no regulatory authority exists mandating such a "solicitation" obligation, nor is one cited for that proposition.

- The very first sentence of the Introduction to the Proposed Rule provides: "OFCCP requires covered federal

contractors *to obtain*, where possible, gender, race and ethnicity data on applicants and employees. *See* 41 CFR 60-1.12(c)." (emphasis added). That is incorrect. 41 CFR 60-1.12(c)(1) actually states: "For any record the contractor *maintains* pursuant to this section, the contractor must be able to identify: (i) The gender, race, and ethnicity of each employee; and (ii) where possible, the gender, race, and ethnicity of each applicant." (emphasis added).

- The Introduction to the Proposed Rule also states incorrectly that contractors "must *collect* gender, race and ethnicity data" of applicants and hires, citing to the OFCCP's Federal Contract Compliance Manual Section 2H01(b). This section refers to 41 CFR 60-3.4A and 60-3.15A, neither of which require contractors to "collect" such data. 41 CFR 60-3.4A states that contractors "should *maintain* and have available for inspection" information that will disclose the impact of selection procedures, and that when there are large numbers of applicants, "such information may be *retained* on a sample basis ..." Similarly, 41 CFR 60-3.15A states that users of selection procedures "should *maintain* and have available for each job information on adverse impact on the selection process for that job ..."

- The Analysis section of the Proposed Rule further illustrates that the Proposed Rule attempts to mandate a new requirement to "obtain" demographic information, which goes above and beyond the current requirement to retain or maintain such information. For example, the Proposed Rule incorrectly states (again) that 41 CFR 60-1.12(c)(1)(ii) "requires contractors *to obtain* information, where possible, on the gender, race, and ethnicity of applicants." As set forth above, 41 CFR 60-1.12(c)(1)(ii) requires contractors to maintain such information.

Thus, all the relevant regulations are quite clear that gender and race/ethnicity data acquired by a contractor are to be "maintained", and not "obtained". The Merriam-Webster Dictionary helps to illustrate this distinction. The definition of "maintain" is "to keep in an existing state." The definition of "obtain", however, is "to gain or attain usually by planning or effort; secure, win, earn, acquire." Applied to the matter at hand, these definitions demonstrate the important distinction between the requirement to "maintain" records that a company already has in its possession, and the requirement to "obtain" such information by affirmatively approaching and acquiring such information from applicants. We could find no OFCCP regulation that required a contractor to solicit or obtain these data from applicants.

The Interpretive Guidelines published in connection with the Uniform Guidelines reflect this distinction as well. For example, Question 84 asks whether the user is obliged to "keep records" of the impact of its selection processes, and the Answer states that users are obliged to "maintain" such information. Additionally, the Answer to Question 85 provides that in certain circumstances (not at issue here) a user is required to "collect, maintain, and have available" information on the impact of the selection process. The dictionary definition of "collect" is "to bring or come together into one body of place," "gather," or "to gain control of." This definition does not indicate an affirmative requirement to seek out and acquire (or "solicit" or "obtain") new information, but to gather, bring together, "collect" information that has already been maintained. Similarly, Questions 86 and 87 involve when information should be "maintained," and the Answers to both questions provide guidance on the obligations to "keep such records" and other "record keeping" requirements. Finally, Question 88 asks how a user should "collect" information. The Answer provides that "enforcement agencies will accept different procedures that capture the necessary information," but nowhere mandates that such data must be "solicited" or "obtained." The dictionary definition of "capture" is "to take captive" or "preserve in a relatively permanent form." Thus, this interpretive guideline indicates that the regulations require contractors to preserve (or "capture") information that has been received, but not to actively obtain information that it does not have.
Furthermore, Section 60-1.12(c)(1)(ii) requires a contractor to identify, "where possible" the gender, race, and ethnicity of each applicant from the records that the contractor "maintains" pursuant to this provision. Examples of when it is possible to maintain such information include when an applicant voluntarily identifies one's gender or race/ethnicity, or if the applicant's gender or race/ethnicity can be visually identified at an interview. In both cases, the applicant has made it possible for the contractor to possess, maintain, capture or collect the race and gender data of its applicants, as required by the regulations. In other words, because it possesses the information, it must "maintain" it. However, the regulations clearly do not require the contractor to actively seek out ("obtain") such information from a contractor.

2) OFCCP should persist with its conclusion that those persons interested in employment and *less than minimally qualified* are NOT "applicants" within the meaning of Executive 11246. See, in particular, Section 202(2) of the Executive Order which explicitly so states:

"The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all *qualified applicants* will receive consideration for employment without regard for race, color, religion, sex or national origin" (emphasis added).

Apart from the express dictate of Executive Order 11246, itself, analyzing the rejection of those not qualified to perform the at-issue work leads to non-sensical, wasteful and costly analyses not advancing the interests of non-discrimination law. If the person cannot perform the job because lacking even minimal qualifications, there is a high confidence that non-selection will occur because of the lack of qualifications and not because of skin color, religion, gender or national origin. Indeed, to cause persons with less than minimum qualifications to be considered and hired only serves to heighten the misery for all as the contractor is subsequently compelled to suffer inadequate performance and the employee must face the ignominy of eventual termination for poor performance.

3) OFCCP should specifically re-affirm UGESP Question and Answer 88 (re race/sex/ethnicity identification) and should expand its helpful guidance to specifically note that contractors have no duty to create "sequential" systems to identify the race, sex or ethnicity(R/S/E) of applicants. In other words, if a contractor elects to identify the R/S/E of applicants by using an electronic invitation to self-identify, and only 25%, perhaps, of all applicants respond to that identification, OFCCP should make clear that no further contractor effort to "identify" the R/S/E of the remaining applicants is required.

4) OFCCP should make clear that its proposed rule defining the term "Internet Applicant" is elective, and not mandatory, such that if a contractor did not want to expend the considerable resources needed to parse interested candidates into piles of "applicants" and "non-applicants", the contractor could elect to conduct adverse impact analyses on the entire and unrefined collection of persons expressing interest.

5) OFCCP should make clear that the definition it proposes for "Internet Applicant" is the same and no different from the definition to be applied to those who apply for employment other than through use of the Internet. There is no analytical difference between the two forms of intake of expressions of interest in employment, even though the physical manner of application, of course, varies . The definition of the term "applicant" springs from common language in Executive Order 11246. Accordingly, there should be common definition applied to the differing physical forms of application.

6) OFCCP should provide guidance and make clear the fine line distinction between what is "recruitment" activity NOT subject to the UGESP and what is "selection" and thus subject to the UGESP. OFCCP might specifically include the below examples in the pre-amble to its final regulations to help distinguish these two activities for contractors and for its Compliance Officers:

EXAMPLE 1: "Recruitment" (not "Selection"): = advertising, outreach, use of networking and/or search firms etc. - the process of inviting and locating potential applicants.

EXAMPLE 2: "Selection": using objective criteria to make a choice from among candidates found through recruitment.

The NCILG and the SVILG thank you for your time and consideration. Should you have any questions, please do not hesitate to call 650.335.7144.

---

immediately notify the sender and/or Fenwick & West LLP by telephone at (650) 988-8500 and delete or destroy any copy of this message.